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SOUTH AFRICAN LAW COMMISSION

REPORT 12

on

the law of divorce and matters incidental thereto

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SOUTH AFRICAN LAW COMMISSION

To the Honourable J.T. Kruger, Minister of Justice

REPORT

ON

THE LAW OF DIVORCE AND MATTERS INCIDENTAL THERETO

The Commission has inquired into the South African law of divorce (Project No. 3 of 1974 on the Commission's approved programme) with a view to improving this branch of our law and adapting it to the requirements of present-day conditions. We have the honour to submit to you herewith, in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973) our report and recommendation.

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REPORT

ON

THE LAW OF DIVORCE AND MATTERS

INCIDENTAL THERETO

1. ORIGIN OF THE PROJECT

The inquiry into the law of divorce originated from a more specific inquiry conducted by the Commission at the beginning of 1974 into a proposal that provision be made by legislation that a decree of divorce should not be granted on the ground of malicious desertion unless it is proved that for an uninterrupted period of not less than six months immediately preceding the issue of the summons for divorce, the parties have lived apart in separate households. The objects of the proposed amendment were to curb collusion between the parties and to try to prevent over-hasty and ill-considered divorces by affording the parties sufficient opportunity for reflection and reconciliation. After consultation, however, it appeared that for a variety of reasons the proposal was not acceptable. The inquiry did, however, also bring to light other defects and unsatisfactory aspects in our divorce laws. In fact, it became clear that our divorce laws as a whole ought to be revised. At the request of the Commission, the Minister approved the extension of the project so that it would cover the entire field of the South African law of divorce.

2. MODUS OPERANDI

2.1 The inquiry commenced at the beginning of 1975. The research and the collection of the information were done by the Secretariat of the Commission. Working documents were submitted to the Commission from time to time. A study was made of the law of divorce in various Western countries. The reforms of recent years in various countries in the field of the law of divorce were also duly noted. Thereafter a study of the problems in our own divorce laws was embarked upon. A questionnaire was prepared by the Commission and sent to a large number of persons who and bodies which, in the opinion of the Commission, would be able to make contributions towards the reform of our divorce laws. The questionnaire was sent to, inter alia, the General Council of the Bar of South Africa, the Association of Law Societies of the Republic of South Africa, the faculties of law of all the universities in the Republic, the Chief Justice

of South Africa and all the judges president, church bodies, women's organisations, child welfare societies, welfare organisations, marriage guidance counsellors, and individuals. A press statement was also issued, drawing the public's attention to the inquiry, and persons were invited to complete the questionnaire and put proposals to the Commission. A copy of the questionnaire is subjoined to this report as Annexure B.

2.2 A large number of completed questionnaires were returned. In addition, several bodies submitted supplementary memoranda to the Commission, some of these comprising comprehensive study documents. A list of the names of persons and bodies that made representations to the Commission appears in Annexure C. After studying the replies and memoranda, the Commission drafted a preliminary Bill. Under cover of an explanatory memorandum this Bill was sent out to those who responded to the questionnaire and put proposals to the Commission. It was also stated that the Commission was prepared to hear oral evidence. The names of the persons who gave oral evidence appear in Annexure D.

2.3 After considering all the evidence submitted to it, the Commission prepared a final Bill in which are embodied its recommendations for the reform of our divorce laws. This Bill is contained in Annexure A.

3. THE ROLE OF THE LAW WITH REGARD TO MARRIAGE BREAK-DOWN

3.1 It is a known fact that South Africa has a very high divorce rate. In 1975, for example, there were 10 730 divorces among Whites, while in the same year 41 333 Whites got married. It is calculated that the chances of divorce among the Whites in the Republic are at present one in every 3,2 marriages. As stability in married life is of so much importance to any society, the situation is giving rise to concern in all quarters. There is an urgent need for marriage break-down to be curbed. The Commission considered the question whether the law has any role to fulfil in this connection.

3.2 There are those who feel that divorce is too easily granted and that the law should lay down stricter requirements for the dissolution of marriages. There are also those who feel that more should be done to try to effect reconciliation between spouses who are on the verge of divorce. Finally,

there are also those who feel that stricter requirements should be laid down with regard to the contracting of marriages.

3.3 With regard to stricter divorce requirements the Commission merely wishes to mention at this stage that such requirements offer no guarantee against marriage break-down. The existence of such requirements might indeed result in fewer divorces, but there would not be much point in artificially curbing the divorce rate by means of legal rules or in forcing the divorce rate down while marriage break-down continued unabated. In addition, there is the danger that if divorce requirements are too strict serious social problems may result. The question of reconciliation is gone into more fully below. As regards stricter requirements for the contracting of marriages, it must be pointed out that no practical proposals were put to the Commission. It is difficult to see how a person's right to marry can be curtailed.

3.4 The Commission is convinced, and this also appears to be the opinion of the majority of persons who submitted comments in this regard, that the law can do little to ensure the stability of marriages or to prevent marriage break-down. The law has no magic wand with which to solve social problems by the mere enactment of new legal rules. On the other hand, it is important that the law be so equipped as not to be an impediment to other aids that are used in combating marriage break-down.

4. OBJECTS OF THE LAW OF DIVORCE

In its questionnaire the Commission asked what should be the objects of the law of divorce. The replies received were various, some of them based on idealistic considerations aimed at curbing divorce. The view most commonly held, however, was that the law of divorce should make it possible for a marriage that has failed to the extent that it no longer exists as a marriage in the true sense of the word, to be dissolved in such a way as to result in the minimum of disruption for the parties and their dependants and to ensure that the interests of minor children are put first.

It was also stressed that the law of divorce should be specially designed not to cheapen marriage. A sound balance must be maintained between the interests of the parties concerned on the one hand and the society as a whole on the

other. In the Commission's opinion, the object to be pursued is to lay down realistic rules for the dissolution of marriages. By realistic rules is meant rules which are in keeping with present-day needs, which take due account of the interests of all those involved and of society, and which do not lose sight of society's conception of what is reasonable and just.

5. THE EXISTING GROUNDS OF DIVORCE

5.1 In the South African law of divorce there are two common law grounds of divorce, namely, adultery and malicious desertion. In 1935 the Legislature added two further grounds of divorce, namely, incurable insanity and habitual criminality. The common law grounds of divorce are based on the guilt principle, that is to say, the success of the plaintiff's action is dependent upon wilful misconduct on the part of the defendant being proved. Indeed, adultery was a criminal offence in our law until the Appellate Division ruled in 1914 that the legal rule in question had been abrogated by disuse.[1)]

5.2 Adultery consists in the wilfull extra-marital sexual intercourse of a party to a marriage.[2)] A single act of adultery is a sufficient ground for a divorce action. Clear evidence of adultery is, however, required. If the plaintiff himself has committed adultery this is a valid defence unless the court condones his adultery. The degree of guilt of the spouses is an important consideration in deciding on the question whether the plaintiff's adultery ought to be condoned.

5.3 By malicious desertion is meant an intentional act of physical desertion or serious failure in fulfilling the marital obligations, coupled with the intention to bring the marriage relationship to an end.[3)] There are different forms of malicious desertion : actual physical desertion; constructive desertion; refusal of marital privileges; and imprisonment for life. In the case of constructive desertion it is the so-called innocent party that leaves the matrimonial home because he or she is driven to this by the wilful

1) Green v. Fitzgerald, 1914 AD 88.

2) Hahlo: The South African Law of Husband and Wife, 4th Edition, Chapter 26.

3) Hahlo, op. cit., Chapter 27.

misconduct of the other party. A large variety of acts may amount to constructive desertion. The test that is applied is whether the defendant's behaviour was of such nature as to make cohabitation dangerous or intolerable for the plaintiff. In addition, the defendant's intent to bring the marital relationship to an end through his conduct must be apparent. By far the majority of divorce actions in the Republic are based on malicious desertion.

5.4 An action on the ground of malicious desertion actually consists of two actions rolled into one, namely, a preliminary action for restitution of conjugal rights, and, failing such restitution, a final action for divorce. For this reason a decree of divorce in an action on the ground of malicious desertion is invariably preceded by an order for the restitution of conjugal rights.

5.5 The Divorce Laws Amendment Act, 1935 (Act 32 of 1935), prescribes the requirements for divorce on the grounds of insanity and habitual criminality. In the case of insanity it is required that the defendant shall for a period of not less than seven years have been subject to the provisions of the Mental Diseases Act, 1916[4)] and that the court shall be satisfied by the evidence of at least three medical practitioners, two of whom shall be alienists, that the defendant is incurable. It was also provided that where the plaintiff is the husband he must not be to blame for the defendant's condition. In the case of habitual criminality, the defendant shall have been detained in prison for at least five years after having been declared to be a habitual criminal. It is competent for the court to refuse a decree of divorce if it is satisfied that the plaintiff voluntarily assisted in the commission of the crime which led to the defendant's being declared to be a habitual criminal.

6. DEFECTS OR SHORTCOMINGS IN THE EXISTING LAW OF DIVORCE

6.1 In reply to question 4 of the Commission's questionnaire several alleged defects or shortcomings in the law of divorce were pointed out. These are dealt with briefly below.

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4) In section 1(a) of Act 32 of 1935 the erroneous short title "Mental Diseases Act" is used. Actually the Mental Disorders Act, 1916 (Act 38 of 1916), is intended.

6.2 Most of the objections to our law of divorce can be traced back to the guilt principle on which the common law grounds of divorce are based. It is contended that it is unrealistic to proceed from the assumption that the blame for the break-down of a marriage lies only with one of the spouses while the other is completely innocent. In by far the majority of cases both parties are to a greater or lesser extent to blame for their marriage breaking down. To cause the marriage to dissolve, the plaintiff must, however, make out a case for the defendant's having wrecked the marriage by his intentional misconduct. In the first place this gives rise to unnecessary quarrels and bitterness between the spouses, particularly when it comes to the forfeiture of the patrimonial benefits of the marriage, and the payment of maintenance or the supervision and control of minor children from the marriage. To obtain a decree in his or her favour, the one spouse goes out of his or her way to put all the blame for the failure of the marriage on the other. In contested actions the most unsavoury details of the intimate relationship are made public. The action often develops into a prolonged hearing which entails high costs. The accusations that are flung back and forth are not only humiliating to the spouses but can also be extremely harmful to the children of the marriage.

6.3 The guilt principle is in direct conflict with any possibility of reconciliation that may still exist between the spouses. Once a summons for divorce has been issued, the spouses find themselves in opposing camps. They avoid each other, often on the advice of their legal advisers, so that their action will not perhaps be frustrated by the defence of condonation. The order for the restitution of conjugal rights which must precede any action on the ground of malicious desertion is farcical and, has become little more than a mere formality. The restitution of conjugal rights is the last thing the plaintiff wants. Yet the law requires him or her to sue for this first, and only failing this for divorce.

6.4 A further consequence of the guilt principle is that the so-called innocent party can keep the other party indefinitely bound to the marriage. Only the "innocent" party may sue for divorce. The result of this is that marriages that are in fact dead cannot be dissolved. This gives rise to social problems.

6.5 Adultery and malicious desertion are for the most part only the ultimate acts which indicate that a marriage has broken down. They are more often the effects of a marriage having broken down than the causes of break-down. The break-down of a marriage is often not due to the guilt of either of the spouses. This results in the spouses acting in collusion to fabricate evidence on which a divorce action can be based. Although the court will refuse a divorce if it is satisfied that the spouses have acted in collusion in order to give perjurious evidence it is extremely difficult to uncover collusion in uncontested divorce actions. The court must judge according to the evidence given and has only the undisputed evidence of the plaintiff at its disposal.

6.6 The guilt principle also has an unsatisfactory effect as regards maintenance. The court may, subject to an agreement between the spouses, only make a maintenance order in favour of the innocent party against the guilty party. This means that a single misstep can deprive a party of all rights to maintenance, regardless of the duration of the marriage, the need for maintenance or the contribution which such a party has made towards increasing the property of the other party.

6.7 Another objection to our law of divorce is that it is too rigid. It leaves the court no discretion to refuse a decree of divorce where the court is of the opinion that the marriage can still be saved. On the other hand, the court is also left no discretion to grant a decree of divorce where malicious desertion has not been proved, even if the court were to be satisfied that the further cohabitation of the spouses would be intolerable or even dangerous to the plaintiff.

6.8 A further objection raised was that our law of divorce does not make sufficient provision for safeguarding the interests of children. In most cases the parties enter into an agreement specifying the arrangements as to the custody of the children and the financial provision to be made for them, as well as the non-custodial parent's right of access to the children. Such an agreement may on the face of it appear to be aimed at serving the best interests of the children. After a time, however, this often does not appear to be so. The interests of the children ought to take preference. The court

ought not to make any order as to their custody until such time as it has considered a social welfare report.

6.9 As regards the forfeiture of the patrimonial benefits of a marriage, it is contended that our law is too rigid. The court may make an order of forteiture only if this has been specifically sought and it is not competent, moreover, for the court to refuse such an order if it has been sought and the divorce action succeeds. If one bears in mind that both spouses may be to blame for the failure of the marriage, provision ought to be made for the partial forfeiture of benefits.

6.10 As regards divorce on the ground of mental illness, there are many persons who consider the current requirements to be altogether too strict. It is contended that these days it is possible to establish with certainty within a far shorter period than the required seven years whether a person's mental illness is incurable. The Mental Disorders Act, 1916, in which this ground of divorce is referred to, has in the meantime been superseded by the Mental Health Act, 1973 (Act 18 of 1973). The definition of mental illness in the new Act differs from the relevant provisions in the old Act. Consequently, it is not always clear whether a person will be subject to the provisions of the new Act.

6.11 In the case of habitual crime it is regarded as an anomaly that divorce may be obtained on this ground but not if a person has been sentenced to a long term of imprisonment, of, say, more than 10 years.

6.12 Most of the objections mentioned above appear to be well founded. It is also clear that the guilt principle, which to a large extent forms the foundation of our law of divorce, is giving rise to the most dissatisfaction. The question is, therefore, whether an acceptable alternative basis can be found to take the place of guilt. Two possibilities present themselves, namely, divorce on the ground of consent, and divorce on the ground of a marriage having broken down irretrievably. These possibilities are dealt with separately below.

7. DIVORCE ON DEMAND OR BY CONSENT OF THE SPOUSES

7.1 Those in favour of the consent of the spouses as a ground of divorce argue that the spouses ought, after all, to know better than anyone else whether their marriage has failed hopelessly. If both spouses want a divorce, there is no good reason why the marriage cannot be dissolved. Once things have come to this pass it would be pointless to waste time and incur costs in an effort to establish whether the marriage has in fact broken down hopelessly. Divorce ought then to be granted on demand. It is also contended that divorce by consent of the parties will create the opportunity for the action to be conducted in a far more peaceable atmosphere. Furthermore, this would serve the interests of the children better, since emotional tension will be eased to a large extent. In addition, costs of the action would be far lower than would otherwise be the case. It is also contended that these days most marriages are in point of fact already being dissolved on the ground of the consent of the spouses. More than 90 per cent of all divorce actions are not contested. In a large percentage of these divorces both spouses want a divorce. They come to an agreement that the one spouse will institute the action and that the other will not contest it. Only the most essential evidence is presented. In many cases the evidence is fabricated in order to create a ground of divorce.

7.2 The objections that are levelled against the granting of divorce on the ground of the consent of the spouses are, in the first place, that this would detract from marriage as a social institution. Marriage is not just a private contract between two persons which contract is capable of being terminated by mutual agreement. If this were so, many people would contract trial marriages. Society, however, has an interest in the stability of marriages and must ensure that marriages are not dissolved for insufficient reasons. It would, moreover, be extremely difficult to determine whether a spouse's consent to the dissolution of a marriage has been given voluntarily. Finally, it must be pointed out that in countries where the consent of a spouse is a ground of divorce, the divorce rate is much higher than in the countries where consent is not recognised as a ground of divorce.

7.3 England's Law Commission considered, inter alia, consent as a ground of divorce and found it acceptable provided that it be introduced only as an

additional ground of divorce and be confined to divorce in which no dependent children are involved. The Law Commission was also of the opinion that there should be independant verification of the genuineness of the spouses' consent. Finally, the Law Commission held the view that, even if divorce by consent were circumscribed in the ways suggested, there should be a prescribed period of separation between the spouses before divorce is granted on this ground.[5] The Legislature of England did not, however, accept the mere consent of the spouses as a ground of divorce. Nor was provision made for this ground of divorce in the amended divorce legislation of Scotland, which came into operation on 1 January 1977. Indeed, there are few countries where divorce can be obtained purely on the ground of the consent of the spouses. Sweden, however, in 1973 introduced into its law of divorce the rule that the spouses are entitled to a divorce if they both consent to the dissolution of their marriage.[6] In the German law of divorce as amended with effect from 1 July 1977, irretrievable break-down of a marriage constitutes the only ground of divorce. There is, however, an irrebuttable presumption that a marriage has broken down irretrievably if after one year of separation the spouses are convinced that their marriage has broken down irretrievably and they consent to divorce.

7.4 Almost without exception those who answered question 20 of the Commission's questionnaire categorically rejected the granting of divorce on the ground of the spouses' consent. The Commission, too, does not find this an acceptable ground of divorce for our law of divorce.

8. THE IRRETRIEVABLE BREAK-DOWN OF A MARRIAGE AS A GROUND OF DIVORCE

8.1 In representations to the Commission, as well as in oral evidence heard by the Commission, a strong case was made out for irretrievable marriage break-down to be the basis on which divorce is granted. By irretrievable marriage break-down is meant that the marriage relationship of the spouses has degenerated to the point where their marriage no longer exists as a marriage in the true sense of the word and where there is no reasonable prospect of a

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5) Paragraphs 82 - 84 of the Law Commission's report entitled: Reform of the Grounds of Divorce: The Field of Choice, 1966.

6) Family Law Quarterly, Vol. IX No. 2, 1975, p. 380.

normal marriage relationship between them being resumed. It is argued that the interests of the parties concerned, as well as those of society as a whole, would be best served by dissolving a marriage that exists only in name but is in actual fact dead. Nobody can benefit by keeping up dead marriages; on the contrary, this may give rise to grave social problems.

It is contended, moreover, that irretrievable marriage break-down is a more realistic and valid basis for the dissolution of a marriage than the existing grounds of divorce, which are based on the guilt principle. In reality adultery and malicious desertion are only symptoms of marriage break-down. In themselves, however, they offer no proof that the marriage relationship cannot be restored.

8.2 On the one hand, irretrievable marriage break-down as a ground of divorce meets the need that exists for dead marriages to be dissolved, but, on the other hand, the idea that a marriage that is still viable should not be dissolved is implicit in this ground of divorce. It is not aimed at making divorce easier; rather, it is aimed at restricting divorce to those cases where divorce is necessary. The accent is placed on the irretrievability of the marriage relationship and, for this reason this ground of divorce holds greater possibilities of the spouses' being reconciled than the existing grounds of divorce.

8.3 The main consideration in favour of irretrievable marriage break-down as a ground of divorce is that it is not dependent upon the guilt of a spouse. If it is evident that a marriage is no longer viable, such a marriage can be dissolved at the request of either of the spouses, regardless of whether one of them was more to blame or less to blame for the marriage breaking down. The elimination of the element of guilt creates a climate favourable to the dissolution of a marriage in a more peaceable manner. Furthermore, the consequences of the dissolution of the marriage as regards property and the arrangements relating to the children of the marriage can be dealt with in a calmer atmosphere and in a more satisfactory manner.

8.4 The main objection of those who oppose the introduction of irretrievable marriage break-down as a ground of divorce is that it will not be possible to

apply this ground in practice. They contend that irretrievable marriage break-down is a vague concept which the courts will not be able to handle. There is no objective criterion for establishing whether a marriage has broken up irretrievably. The courts will have to judge of this from one case to the next. There will be no uniformity. On a particular set of facts, one court may judge that a marriage has broken down irretrievably, whereas another court may come to some other conclusion on the basis of the same facts. In the interests of the spouses and their legal representatives the outcome of a hearing in which accepted criteria have been applied, should, with a reasonable measure of certainty, be predictable and it ought not to be dependent upon the personal views of a judge.

8.5 There are also those who are opposed to divorces being granted on the ground of irretrievable marriage break-down because they feel that this would conflict with the principle of our law that nobody should be allowed to benefit by his or her own misconduct. They feel that it would constitute an injustice to an innocent spouse if the marriage were to be dissolved against such a spouse's wishes, to the advantage of the spouse whose misconduct gave rise to the break-down of the marriage. This question, as well as the question as to whether irretrievable marriage break-down can be applied in practice as a ground of divorce, will be examined more fully below.

8.6 Over the past two or three decades provision has been made in the divorce laws of several Western countries for divorce on the ground of irretrievable marriage break-down. In many cases this was done after an inquiry and on the recommendation of the law reform body of the country concerned. In some countries irretrievable marriage break-down was introduced to take the place of the existing grounds of divorce, while in other countries it is only an additional ground of divorce. Various methods of determining whether a marriage has broken down irretrievably are used. This ground of divorce at present exists in the divorce laws of, inter alia, England, Scotland, New Zealand, Australia, Canada, various states of the USA, West Germany, France and the Scandinavian countries.

8.7 By means of its questionnaire the Commission tried to gauge the opinion as to whether provision should also be made in the South African law of

divorce for divorce on the ground of irretrievable marriage break-down. Seventy-five per cent of those who answered the questions are in favour of this ground of divorce being accepted in our law. Sixty per cent of these people feel that irretrievable marriage break-down should supersede the existing grounds of divorce and apply as the only ground of divorce. Forty per cent are of the opinion that it should only be added to the existing grounds of divorce as a new ground of divorce. The 25 per cent who are not in favour of divorce on the ground of irretrievable marriage break-down either hold the view that the existing grounds of divorce are sufficient or the view that other grounds should be added, for example, addiction to liquor or drugs, cruelty, etc. The persons and organisations that are in favour of divorce on the ground of irretrievable marriage break-down are, inter alia, the Law Societies; the Family Life Commission; the South African National Council for Marriage Guidance and Family Life; the South African National Council for Child and Family Care; the faculties of law of the universities; various women's organisations; and a number of judges.

9. CAN IRRETRIEVABLE MARRIAGE BREAK-DOWN BE APPLIED AS A GROUND OF DIVORCE

9.1 As has already been noted, there are quite a number of persons who have doubts as to whether the ground of divorce termed irretrievable marriage break-down can be applied in practice. The problem seems to be that of finding an acceptable criterion by which to determine irretrievable marriage break-down. For the sake of uniformity and of certainty at law, it is necessary to have a test that is objective.

9.2 On the one hand, one finds the view that each case must be judged on its own merits. The condition of the marriage must be judged in its totality in the light of the factors that have given rise to the break-down, the attitude of the spouses towards one another and towards their marriage relationship, and any possibility of reconciliation that may exist. In other words, a fairly full inquiry must be carried out before the court proceeds to the dissolution of the marriage. The Committee of the Archbishop of Canterbury, wich inquired into the law of divorce in England in 1964, was a particularly strong proponent of this idea.[7] The Committee realised that a procedural

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7) Cf. the Committee's report entitled: Putting Asunder: A Divorce Law for Comtemporary Society, 1966.

change would be necessary in order to provide for inquests of this nature and that this would be accompanied by high costs. Nevertheless, in the interests of the spouses and of society, the Committee found it necessary that there should be a proper inquest into the irretrievability of a marriage in each case, before that marriage is dissolved. Of course, the Committee was strongly motivated by reconciliation of the spouses and the preservation of marriages. The members of the Family Life Commission[8] who gave evidence before the Commission adopt an approach which is remarkably like that of the Committee of the Archbishop of Canterbury. The Family Life Commission suggests a procedure in terms of which a senior social worker specially trained for purposes of divorce proceedings should be attached to every divorce court. All divorce proceedings must be channelled through this official. He in person, or by using special services, must investigate the condition of the marriage relationship of the spouses concerned, as well as any possibilities of reconciliation, and report to the court on these matters.

9.3 For practical reasons, England's Law Commission found the inquest procedure as suggested by the Committee of the Archbishop of Canterbury totally unacceptable. If it is remembered that there are more than 100 000 divorces a year in England and that about 93 per cent of these are disposed of as uncontested suits, it can be appreciated how enormously court staff and other services would have to be expanded to put this idea of investigation into practice. Moreover, the Law Commission did not consider it necessary that there should be an investigation into the state of the spouses' marriage relationship in every divorce case and into the possibilities of restoring the marriage. In by far the majority of cases it is immediately clear that a marriage has broken down completely, for example, where the parties have for a considerable time no longer been living together as man and wife. In such cases it would be safe to conclude that the marriage is beyond retrieval. The Law Commission consequently put forward certain complexes of facts as criteria from which the irretrievable break-down of a marriage can be deduced prima facie. This complex of facts, which was later embodied in England's divorce law[9], is the following :

8) A standing commission, set up by the Minister of Social Welfare and Pensions, which has gone into the question of divorce specifically from a social point of view.

9) Section 1 of the Matrimonial Causes Act, 1973.

(a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree of divorce being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

If any of these complexes of facts is proved, the court grants a divorce unless it is satisfied that the marriage has not broken down irretrievably.

9.4 In most countries where irretrievable marriage break-down constitutes a ground of divorce, irretrievability is tested against certain complexes of facts such as the effluxion of a period of separation between the parties. This is the case in, inter alia, the divorce laws of England, New Zealand, Australia, Canada, some of the states of the USA, and West Germany. There are few instances of its being left to the courts to establish irretrievable marriage break-down without guidelines or prescriptions having been provided for the courts.

9.5 By means of its questionnaire, the Commission tried to establish whether it would be possible to apply irretrievable marriage break-down as a ground of divorce within the framework of our existing divorce procedure and what changes, if any, would have to be made. The majority of those who answered the question do not foresee any insurmountable problems in this connection.

They point out that the question whether or not a marriage has broken down irretrievably is a question of fact. This question, like any other question of fact, will have to be decided on the available evidence. Since the introduction of the new ground of divorce will result in a drastic change in the legal position, it may be desirable to lay down guidelines for the courts, possibly in the form of rebuttable presumptions. Strictly speaking, however, it is not necessary to lay down such guidelines, since the courts will probably have no trouble in determining when a marriage should be regarded as having broken down beyond retrieval. It is particularly important to guard against the courts' discretion being curtailed. The majority of the respondents to the questionnaire are opposed to set periods of separation being prescribed, from which the irretrievability of a marriage is to be deduced. Such a period of separation is only one of several factors that the court must take into consideration and it should not be elevated to the position where it is the sole or decisive factor. It would, moreover, be senseless to keep a precarious marriage going for two or even five years if it can rather be proved conclusively that the marriage has broken down irretrievably. Such a long waiting period would not only result in hardship for the parties concerned, but it might also give rise to serious social problems.

9.6 An important question is whether irretrievable marriage break-down should be introduced into our law as a substitute for the existing grounds of divorce or whether it should be introduced only to supplement those grounds. As has already been noted, 60 per cent of those who answered this question are in favour of irretrievable marriage break-down being the only ground of divorce. If the other grounds of divorce were to be retained, the objections raised in connection with the guilt principle would continue to exist. It is likely that less and less use will be made of those grounds of divorce and that more use would be made of the new ground of divorce. However, since those grounds of divorce could without any loss be incorporated in the new ground of divorce, there seems to be no real need for their retention. In any case, the proposed new ground of divorce offers a more valid and justifiable basis for the dissolution of a marriage. It would seem, however, that mental illness as a separate ground of divorce ought to be retained. This aspect will be dealt with more fully below.

10. THE DISSOLUTION OF A MARRIAGE AGAINST THE WISHES OF THE INNOCENT PARTY

10.1 As has already been stated, there are people who object to the dissolution of a marriage against the wishes of an innocent party. In the first place there are those who, appealing to the biblical pronouncement "whom God hath joined together, let no man put asunder", object to divorce on conscientious grounds. In the second place there are those who out of spite refuse to give the other party his or her "freedom". The objection is that the "guilty" party would then be allowed to benefit by his own misconduct, which would be unjust to the innocent party. One has respect for people's Christian beliefs. One can also have sympathy for a really innocent spouse whose marriage is wrecked by the behaviour of the other spouse. Nevertheless, the fact remains that one has to do with a dead marriage. Of what use would it be to either of the spouses or to society to keep the marriage going ad infinitum in name only? Here the interests of society and of the spouse who wants a divorce must be weighed against the interests of the spouse who refuses a divorce.

10.2 England's Law Commission considered the question and inclined to the idea of dissolving such a marriage. The Law Commission recommended, however, that the court should be given a discretion to refuse a divorce in cases where it appears that the defendant will suffer exceptional hardship if a divorce were to be granted.[10] This recommendation was embodied in the Matrimonial Causes Act, 1973.[11]

10.3 The Commission specifically posed this question in its questionnaire, as well as the question whether the court should in such circumstances have a discretion to refuse the divorce. By far the majority of the respondents were in favour of the dissolution of a marriage even against the wishes of the defendant if it so much as appears that the marriage has broken down irretrievably. The majority were also not in favour of the idea that the court should be given a discretion to refuse a divorce in such a case. To judge by public opinion in so far as it emerges from these comments, the interests of the reluctant party must in this case yield to the interests of society. The Commission agrees with this view.

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10) Paragraph 119 of the Law Commission's report.

11) Section 5.

11. MENTAL ILLNESS AS A GROUND OF DIVORCE

11.1 As a ground of divorce, irretrievable marriage break-down is probably wide enough to cover cases where a marriage fails as a result of the permanent mental illness of one of the spouses. In the case of mental illness, however, one is concerned with a special situation for which special rules must be laid down. For this reason it appears to be desirable rather to treat mental illness as a separate ground of divorce. The Department of Health, which was consulted in this regard, agrees with this view.

11.2 The current requirements for divorce on the ground of mental illness are contained in section 1 of the Divorce Laws Amendment Act, 1935 (Act 32 of 1935), the relevant part of which reads as follows :

> "(1) In addition to any other grounds on which a decree of divorce may by any law at present in force in any province of the Union be granted such a decree may also be granted on the ground that the party against whom the decree is sought -
>
> (a) has been subject to the provision of the Mental Diseases Act, 1916, for a period of not less than seven years and is incurable; or
>
> (b) ...
>
> Provided that a Court shall not grant a decree of divorce on the grounds set forth in paragraph (a) unless it is satisfied by the evidence of three medical practitioners of whom two shall be alienists appointed by the Court that the defendant is incurable and unless it is also satisfied that the plaintiff (if the plaintiff is the husband of the defendant) is in no way to blame for the mental condition of the defendant.

The Mental Diseases Act, 1916 (more properly, the Mental Disorders Act) referred to has since been superseded by the Mental Health Act, 1973 (Act 18 of 1973).

11.3 It is fairly generally felt that the requirements for divorce on the ground of mental illness are too strict, particularly as regards the seven-year period during which the defendant was to have been subject to the provisions of the Mental Disorders Act. Consultations were held with the Department of Health in this connection. At the invitation of the Commission, two experts from the Department of Health also agreed to give oral evidence before the Commission. From their evidence it appeared that when a person suffering from a mental illness receives active treatment in an institution his chances of recovery for the purposes of divorce can be determined with a reasonable measure of certainty within a period of two years. Attention was also given to the problem that arises when a person sustains brain damage as a result of injuries, in consequence of which he is in a permanent state of unconsciousness. According to the said evidence it is possible, when such a condition has lasted for a period of not less than six months, to determine with a reasonable measure of certainty whether that person will ever regain consciousness or be able to lead a normal life. Guided by the said witnesses and by the Department of Health, the Commission formulated the requirements for divorce on the ground of a person's mental illness as contained in clause 5 of the proposed Bill.

12. RECONCILIATION OF THE PARTIES

12.1 In memoranda submitted to the Commission, as well as in oral evidence, it was strongly stressed that everything possible should be done to reconcile spouses who are about to part. The object of attempts at reconciliation is not only to try to prevent divorce, but particularly to create sound marriage relationships.

12.2 All the evidence at the Commission's disposal points to the fact that once one of the parties to a marriage has gone so far as to institute divorce proceedings against the other the chances of the parties' being reconciled are fairly slim. This appears to be the experience of social workers as well as lawyers who have to do with divorces in practice. Even the members of the Family Life Commission, who strongly advocate reconciliation procedure in our law of divorce, concede that little success can be achieved once the parties have become involved in a lawsuit against each other. This was also the finding of the Law Commission in England, one of whose statements in this

connection reads as follows[12]:

> "If more marriages are to be saved from breakdown, we believe that the preventive medicine of guidance before marriage and help during marriage is likely to achieve far more than attempted cures after the breakdown has occurred."

12.3 To what extent the application of the guilt principle and the resultant recriminations between the two parties complicates reconciliation between them cannot readily be determined. It is doubtful, however, whether the introduction of irretrievable marriage break-down as a ground of divorce will in itself be a significant factor in facilitating reconciliation of the parties. Nevertheless, there are cases where the parties, given the necessary help and guidance, even while divorce proceedings between them are pending, become reconciled. What appears to be important is that the divorce laws should afford sufficient opportunity for reconciliation and that the parties, where this is at all appropriate, should be encouraged to avail themselves of this opportunity. It is clear, however, that reconciliation cannot be forced upon the parties.

12.4 In other legal systems there are various rules aimed at ensuring that marriages are not lightly dissolved and that the parties will have seriously considered the possibility of reconciliation. Section 3 of England's Matrimonial Causes Act, 1973, for example, provides that no petition for divorce shall be presented to the court before the expiration of a period of three years from the date of the marriage unless on application the court allows the presentation of the petition on the ground that the petitioner will suffer exceptional hardship or on the ground of exceptional depravity on the part of the respondent. In considering the petition the court takes into account, inter alia, the possibility of the parties' being reconciled. Section 1(5) of the said Act also provides that every decree of divorce shall in the first instance be a decree nisi and shall not be made absolute before the expiration of six months from its grant unless the High Court by general order from time to time fixes a shorter period. The object is obviously to afford the parties a final opportunity of reconciliation. Furthermore, more

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12) Paragraph 29 of the Law Commission's report.

than enough opportunity for reconciliation of the parties is provided, since the Act requires certain periods of separation to have expired before separation can serve as proof of the irretrievable break-down of a marriage. Section 6 of the Act further provides that rules of court may be made for requiring the petitioner's solicitor to certify whether he has discussed with the petitioner the possibility of a reconciliation and given him or her the names and addresses of persons qualified to help effect a reconciliation between parties to a marriage who have become estranged. The Divorce Act, 1968, of Canada places a similar obligation on the legal representative of a party to divorce proceedings. In addition, the Canadian Act obliges the court to interrogate the parties in order to establish whether there is any possibilities of their reconciliation, unless it would obviously be inappropriate to do so. If the court deems this necessary, it may even refer the parties to a suitable marriage guidance counsellor. The Australian divorce laws also provide that the court may interrogate the parties with a view to effecting a reconciliation and that the court may advise them to avail themselves of marriage counselling. The divorce laws of Germany and France also provide that the judge may interrogate the parties in private in order to satisfy himself that the marriage has broken down irretrievably. If there is a possibility of reconciliation, the case may be postponed for a specified period in order to afford the parties the opportunity of availing themselves of marriage counselling. It would, however, appear that even the detailed provisions of the English law of divorce aimed at the reconciliation of the parties are relatively ineffectual.[13] In its 1973 annual report, the National Marriage Guidance Council reports, for example, that out of a total of 116 376 divorce cases brought before the courts no more than 300 were referred to marriage guidance counsellors for assistance.

12.5 Several questions in the Commission's questionnaire relate to the reconciliation of spouses. From the answers it is concluded that there is little support in South Africa for a provision similar to that in the English divorce laws, in terms of which a certain period after the date of the marriage must expire before a divorce action may be instituted. As regards

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13) See, for example, Seago and Bissett-Johnson: Cases and Materials on Family Law, Sweet and Maxwell, 1976, p. 194.

the idea that a certain period should elapse from the date of the summons to the date of the divorce, there is a diversity of opinions. Quite a number of persons feel that such a "cooling-off-period" is necessary to restore their equanimity and to give them a chance to think calmly about their position. This will create a more favourable climate for reconciliation. If the period is not too long - say, six months - this should not seriously inconvenience the parties. However, the majority, among them the lawyers in particular, seem to hold the view that such a compulsory waiting period would only amount to putting off the inevitable and that this would entail unnecessary costs. Experience has shown that a decree nisi in the case of divorce on the ground of malicious desertion hardly ever results in the parties' reconciliation. After all, if the court has already found that the marriage has broken down irretrievably, this implies that there is no reasonable prospect of reconciliation, and it would be pointless to postpone a final decree of divorce in the vague hope that the parties may perhaps still be reconciled. This would only serve to prolong the disrupted situation in which the parties find themselves.

12.6 The majority of persons are also not in favour of a provision in terms of which the parties must be compelled to produce proof of their having tried in earnest to become reconciled. Compulsion of this kind can very easily become a mere formality without achieving the object for which it was introduced. Attempts at reconciliation should be focused on those cases where there is a reasonable possibility of the parties' being reconciled.

12.7 On the other hand there are those who feel that the law should adopt a positive approach to the reconciliation of parties to a marriage. The law should not just create the opportunities for reconciliation and then adopt a passive wait-and-see attitude. A therapeutic approach is necessary where earnest attempts are made by the law to effect reconciliation. This can be achieved only if our divorce procedure is drastically changed. Many people see family courts as the solution. Family courts are dealt with separately below.

13. FAMILY COURTS

13.1 With various organisations on behalf of whom evidence was given before the Commission or representations were made to the Commission, as well as with

the public at large, there is a strong feeling in favour of family courts being instituted to deal with, inter alia, divorce proceedings. It would seem that there are many who feel that the solution to the divorce question depends largely on the provision of family courts. Upon closer investigation, however, it appears that those in favour of family courts have a rather vague idea of what the character and modus operandi of such courts should be. There is consensus, however, that a family court should have the status of a division of the Supreme Court. The presiding officer should be a judge, preferably one with experience of family matters. He should be assisted by assessors, among whom should be included social workers, sociologists, psychiatrists or clergymen. The family court should have exclusive jurisdiction in all matters pertaining to family life. Included among these are divorces; judicial separation; the nullity, voidability and annulment of marriages; the question of maintenance as it affects the spouses as well as children; custody of children; the adopting of children; disputed paternity; illegitimate children; mistreatment and neglect of children; and any matter pertaining to the safety and welfare of children; juvenile delinquency; damages for adultery, seduction or breach of promise of espousal; claims between spouses relating to patrimonial rights. In the first place the approach of family courts must be remedial and not retributive. Secondly, the procedure followed should be inquisitorial and not accusatorial. Thirdly, the procedure should be simple and informal. Finally, there must be close co-operation between the family court and bodies or authorities concerned with the promotion of family life. In short, it may be said that an ideal family court should have the following characteristics :

(a) It should have comprehensive jurisdiction to be able to adjudicate all matters affecting the family in its family context.

(b) It should have a therapeutic approach aimed at the solution of problems rather than the settlement of disputes.

(c) The procedure of the family court should be informal.

(d) The family court should be within reach of and readily accessible to those in whose interests it has been instituted.

13.2 In various parts of the world there are courts that are known as family courts. However, they differ in character and modus operandi. What needs particular emphasis is that divorce at present still falls outside the jurisdiction of most family courts. The family courts of Canada and most states of the USA concern themselves chiefly with juvenile delinquency and the welfare of children in general. There are only a few states of the USA where family courts have jurisdiction in respect of divorce as well. In the state of New York the family courts have no jurisdiction in divorce cases, but they have jurisdiction as regards conciliation. For a description of the modus operandi of family courts in the State of New York and the results achieved, reference may be made to an article in the Journal of Family Law, Vol. 11, 1971 p. 517 et seq. by Jon M.A. McLaughlin, entitled Court-connected Marriage Counselling and Divorce - The New York Experience. Here it may be mentioned that the results are by no means impressive. In Australia provision was made in 1975 for the institution of family courts[14] which, inter alia, have jurisdiction with regard to divorce, and which are also intended to play an active role with regard to the reconciliation of the parties to the marriage. At this stage it is not known how successfull Australia's family courts are. As regards England, a working party of the Law Commission investigated the possiblity of instituting family courts. The investigation was terminated, however, when the Finer Committee, which actually investigated the question of one-parent families, brought out a report in 1974 in which was recommended, inter alia, the setting up of family courts for England and Scotland. It was recommended that the family courts should have jurisdiction also with regard to divorce suits. In this regard reference may be made to an article in the Journal of the Law Society of Scotland, January 1976, Vol. 21, No. 1, p.12 and Vol. 21, No. 2, p. 52, where the author, Ronald W. Phillips discusses the desirability of family courts for Scotland. Phillips questions the wisdom of the Finer Committee's recommendations in so far as they relate to Scotland. He examines the pros and cons of family courts and remarks :

> "... the experience of the family courts so far in operation reveals that there is in many respects a considerable gulf between the theories expounded and the extent to which these theories have been implemented and consequently many claims for success have not been substantiated."

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14) See the Family Law Act, 1975.

He points out that for the most part lumping together all family matters under one jurisdiction does not work, since particular matters are mostly referred to certain subdivisions of the family courts. Because of the manpower shortage, most family courts are overworked and understaffed, the result being that the services that family courts are supposed to render are suffering. Hearings are delayed and it is not possible to devote sufficient time to individual cases. Furthermore, the family courts display a lack of uniformity in their judgments. Nor are the family courts held in high regard by the general public. He also expresses doubts about the efficacy of the so-called social approach of family courts.

13.3 The Commission's present inquiry relates only to the law of divorce and matters incidental thereto. Consequently the Commission has not gone into the desirability of bringing under the jurisdiction of a single family court other matters that affect the family, for example, the adoption of children, juvenile delinquency, the welfare of children in general, etc. It may be mentioned in passing that an officer of the Department of Justice and one from the Department of Social Welfare and Pensions went on a tour of Canada and the United States of America in 1974 to study the operation of family courts in those countries. Their finding was that our children's courts, maintenance courts and juvenile courts largely fulfil the same function as the family courts that they visited. As regards divorce proceedings, the purpose of family courts, as put to the Commission and as is in fact the case in certain countries, can only be to try to effect reconciliation between the parties and where this is not possible, to regulate the consequences of the divorce in a satisfactory manner in the interests of the parties as well as of the children. The Commission is convinced that reconciliation cannot be forced upon anyone. For that, the goodwill and co-operation of both parties to the marriage are needed. Even if one of the parties desires reconciliation and the other not, no family court or any other court or body can make the marriage succeed. This is in fact the experience of existing family courts. Those who advocate family courts say, however, that in each case there should at least be an investigation into the possibilities of reconciliation, and for this purpose the services associated with a family court are essential. The Commission holds the view that the manpower to make such investigations possible is simply not available. The Commission is persuaded, moreover, that

such investigations are by no means necessary in all cases. From the available information, a judge should be able to tell at a glance in which cases it would be unnecessary to take steps with a view to reconciliation. In the article by Jon M.A. McLaughlin quoted above it is, for example, stated that in 28 018 out of a total of 32 759 divorces brought before the courts in the State of New York it was certified that the parties' attendance at a conference with a view to reconciliation was not necessary. Therefore, in more than 85 per cent of the cases the conciliation bureau of the divorce court decided, on the basis of the information given by the parties without any interview being conducted with them, that any conciliation attempt would be unnecessary. It may be asked whether on the basis of the papers before him, a judge of an ordinary court would not be able to arrive at the same conclusion with equal facility, without its being necessary to involve a family court staff in the matter and to incur the high costs that such a procedure would entail.

13.4 Furthermore, one should not jump to the conclusion that, the Finer Committee having recommended the institution of family courts for England, those courts are going to play a significant role as regards the reconciliation of spouses. Under the English divorce procedure an uncontested divorce suit can in most cases be disposed of on affidavit without its being necessary for the parties to appear before the court at all. There is even talk of this procedure being extended to all undefended divorces in which no children are involved.[15] Even in Australia, where family courts were set up recently, it is possible in some cases to obtain a divorce without its being necessary for the parties to appear in court. In such cases the screening of parties who may be amenable to reconciliation must necessarily fail.

13.5 As regards the therapeutic approach, which is strongly advocated by some, it must be remembered that a family court with any pretensions to being called a court of law must still be a court that applies legal principles. This point is strongly emphasised by William C. Gordon, Chief Judge of the Family

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15) S.M. Cretney: Principles of Family Law, p. 142 and footnote 96(b).

Court of the State of Delaware.[16] It is necessary to guard against the family court's being converted into a social service bureau which deviates from the application of substantive law.

13.6 The Commission is not indifferent towards the idea of reconciliation; on the contrary, it holds the view that the substantive legal rules as well as the divorce procedure should be modified so that every reasonable possibility of reconciliation of the parties can be exploited. In the Commission's view, however, it would not be realistic to change drastically the existing court structure or the divorce procedure for this purpose. The application of the proposed new ground of divorce, namely irretrievable marriage break-down, implies that the court must satisfy itself that any reasonable possibility of the parties' becoming reconciled is excluded. The intention is to provide that for this purpose the court may of its own volition conduct such inquiry as it may deem necessary and postpone the proceedings from time to time to afford the parties the opportunity of availing themselves of any possibilities of reconciliation - see clause 4(2) and (4) of the Bill.

13.7 The Commission, although fully aware of the necessity of safeguarding the interests of children involved in divorces, does not consider it necessary to change the court structure in order to make it possible to afford the interests of children better protection. The procedure may be modified to achieve the desired results within the existing court structure. Instead of instituting a court consisting of experts in specific fields, the court can hear expert evidence. It is possible to provide that a court may, of its own volition, cause an investigation to be conducted into any matter affecting the interests of children. In this connection, see clause 6 of the Bill.

13.8 In many countries the jurisdiction regarding various aspects of family matters rested with various courts and there was confusion and overlapping of jurisdiction; consequently this state of affairs was a major reason why family courts were instituted in order to bring all those matters under the jurisdiction of a single court. The fragmentation of jurisdiction is not a problem that is experienced in South Africa to any marked degree. The

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16) Journal of Family Law, Vol 14, No. 1, 1975, p. 1.

provincial and local divisions of the Supreme Court have jurisdiction in respect of any matter that would normally fall to a family court. For practical reasons many of these matters are, however, dealt with by children's courts, maintenance courts and juvenile courts. In any case, it is utterly inconceivable that the matters dealt with at present by the abovementioned courts could be taken over by a family court with supreme court status. With those services apparently being rendered satisfactorily at present, it would not be practicable to provide a family court of that kind in every rural town.

13.9 The Commission holds the view that, so far as divorce is concerned, the objects envisaged for family courts can be achieved equally well by the existing divorce courts if the adjustments recommended by the Commission with regard to the grounds of divorce are made. If irretrievable marriage breakdown were to be accepted as a ground of divorce and if the accent were no longer to be placed on the guilt of a spouse, this would go a long way towards mitigating the conflict and emotion with which divorce proceedings are fraught. The Commission feels that the introduction of a completely new procedure of an inquisitorial character is not necessary. It should, however, be noted that the proposed procedure under which the court may of its own volition cause certain aspects to be investigated (e.g. clause 4(2) and (6)) does contain inquisitorial elements. As regards the therapeutic approach, the Commission holds the view that it is the function of a court of law to hand down a decision in accordance with the legal rules that have been prescribed and that a court of law cannot be expected to apply therapy. This does not mean, however, that there cannot be close co-operation between the court and bodies or authorities whose function is to apply therapy.

14. SAFEGUARDING OF THE CHILDREN'S INTERESTS

14.1 There is complete consensus that the interests of minor and dependent children should enjoy the highest priority in divorces. Various proposals were put to the Commission in this connection. The Commission also heard a considerable amount of oral evidence on this aspect of divorce. The main proposals are outlined below :

(a) No order as to the custody of minor children should be made until such time as the court has considered a welfare report in this

regard. Notwithstanding any agreement between the parents as to which of them is to have custody and control of the children, it is essential to establish whether the custodial parent is a fit and proper person. It is very often found that the arrangements made by the parties in connection with the non-custodial parent's right of access to the children are not in the best interests of the children.

(b) In the case of contested divorce suits or where the parents cannot agree on the arrangements with regard to custody of and access to the children, the children ought to be represented separately in the proceedings. Provision should be made that either of the parties may be ordered to pay the costs of such representation.

(c) Uncontested divorce proceedings in which children are involved should be placed on a separate court roll so that more time can be set aside for such proceedings. It is also desirable for the papers to be submitted to the trial judge a day or so before the commencement of the hearing so as to afford him sufficient opportunity of thorough consideration of any agreement between the parties so far as the children are concerned, thus to ensure that the best interests of the children will be served.

(d) There ought to be provision that guardianship of the children be granted to the same parent as has been given custody of the children. It sometimes happens that the non-custodial parent (where such parent is the father) loses contact with the children over the years. As natural guardian, however, he is still required to assist the children in all legal acts. This often gives rise to problems in connection with contracts that have to be entered into or documents that have to be signed.

(e) A probation officer, who should be attached to the divorce court, should be appointed. All investigations and reports in connection with children should be channelled to the court through this officer. He should also investigate and report to the court on any

effect that the estate is not necessarily divided equally. If the plaintiff contributed more to the joint estate than the defendant, the amount by which the plaintiff's contribution exceeds that of the defendant is first deducted from the total value of the estate and only the remainder is shared equally. If the defendant made a larger contribution than the plaintiff, the plaintiff is entitled to the estate's being divided into equal shares. In the case of a marriage out of community of property, the separate estates of the spouses naturally continue to exist and the profit and loss of each estate accrue to each estate. In the event of divorce each spouse retains his or her estate. An order of forfeiture has the effect that any benefit which the defendant received from the plaintiff must be restored or that any benefit as yet outstanding cannot be claimed. The benefits relate mainly to gifts or settlements under an antenuptial contract.

15.2 Divorce puts an end to the reciprocal duty of support that existed between the spouses during the subsistence of the marriage. It also brings to an end any maintenance order that may exist between the parties. The court may, however, in terms of section 10 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), make an order against the guilty spouse for the maintenance of the innocent spouse. The maintenance order may be for a specified period or until the death or remarriage of the innocent spouse. The court may also make any agreement between the spouses for the maintenance of one of them an order of court. A maintenance order made under this section may on good cause shown be rescinded, suspended, or varied.

15.3 It was suggested to the Commission that, if the common law grounds of divorce were to be replaced by irretrievable marriage break-down as a ground of divorce, the law relating to the forfeiture of the patrimonial benefits of a marriage ought to be scrapped altogether. However, the solution to the problem is not as simple as that. Where it is only a question of whether a marriage has broken down irretrievably, the guilt of a spouse in relation to the marriage break-down could very well be left out of account. But where it is a question of forfeiting a benefit, the idea that a person may forfeit something without being at fault is completely repugnant to our legal principles and to one's sense of what is fair and just. Furthermore, irretrievable marriage break-down as a ground of divorce does not necessarily

imply that neither of the parties is in any way to blame for their marriage breaking down. It would, for example, be grossly unfair if a plaintiff whose adultery gave rise to the break-down of the marriage were to be able to enforce any promised donation in his favour or to retain half of the value of a farm which the other spouse brought into the marriage. It therefore appears to be necessary that the forfeiture of benefits be retained in our law of divorce and that the conduct of the spouses should continue to play an important part in deciding the question whether or not benefits should be forfeited. In the Commission's view, however, this is not the only factor that ought to be taken into account. The fact that a spouse has been a faithful marriage partner over a long period and has contributed to the joint or separate property of the spouses is another factor that merits consideration. Furthermore, to the Commission it appears to be necessary to provide that the proprietary benefits of a marriage be only partially forfeited in certain cases, and not necessarily entirely.

15.4 It was proposed that the Commission should review the basis on which maintenance is at present granted to an "innocent" spouse. In the Commission's opinion, the duration of the marriage, the property of each of the spouses, their duties, age, state of health, earning capacity, and their standard of living prior to the divorce, together with the extent to which either party was to blame for the marriage breaking down, should be taken into account in making a maintenance order in favour of a party to a marriage. In other words, the guilt factor should not be over-emphasised, but should only be taken into account as one of several factors. The Commission's recommendations in this regard are embodied in clause 8 of the proposed Bill.

15.5 It was also submitted that provision should be made for maintenance out of the estate of a former spouse. In a case where a maintenance order is in force and the person who has to pay maintenance dies, the person in receipt of the maintenance is very hard hit. Such a person is usually dependent upon the maintenance for his or her necessities of life. The Commission considered this problem carefully and came to the conclusion that the creation of a right to maintenance in favour of a divorced person against the estate of a former spouse who has died will give rise to more problems than it will solve.

16. JUDICIAL SEPARATION

16.1 Hahlo[18] calls judicial separation a halfway house between marriage and divorce. It does not dissolve the marriage tie but, for the time being, suspends the duty of cohabitation and the reciprocal assignment of conjugal rights. Judicial separation is granted on the ground that further cohabitation of the parties has become intolerable or dangerous to the plaintiff because of the defendant's conduct. There must be misconduct on the part of the defendant, although that misconduct need not go so far as to show the intention to end the marriage. The common law grounds of divorce may also constitute grounds for judicial separation. Normally, however, judicial separation is sought in respect of conduct which does not constitute a sufficient ground of divorce. Spouses in respect of whom a decree of judicial separation has been granted usually live apart for years without the marriage relationship ever being restored.

16.2 In question 27 of its questionnaire, the Commission asked whether judicial separation should be retained in our law. Only a few persons were in favour of its being retained. The reasons given for its retention are, first, that it serves a purpose in cases where persons have religious objections to divorce and, second, that it offers an opportunity for reconciliation of the parties. However, by far the majority are in favour of judicial separation's being abolished altogether. The main objections against judicial separation are that it is based on the guilt principle and that it is not accordant with the object of dissolving a marriage on the ground of irretrievable marriage break-down. In practice, it leads to the continuance of dead marriages. As an incentive to reconciliation, it does not offer much; on the contrary, it has the effect of widening the gulf between the parties. The grounds on which judicial separation may be obtained will in most cases already produce sufficient proof of the irretrievability of the marriage. The Law Society of the Transvaal describes judicial separation as an anachronism which should be removed from our law, pointing out that it is often used to intimidate the other party and to try to acquire benefits that cannot be justified.

16.3 The Commission has come to the conclusion that judicial separation is not accordant with the fundamental concept that the dissolution of a marriage that

18) Op. cit., p. 329.

is dead should be possible if sought by either of the parties. The Commission recommends the abolition of judicial separation.

17. THE PUBLICATION OF PARTICULARS CONCERNING DIVORCE PROCEEDINGS

17.1 As has already been mentioned, representations were made to the Commission that divorce proceedings in which children are involved should be heard in camera and that the publication of particulars concerning such divorce proceedings should be restricted. The idea was also expressed that all divorce proceedings should take place in camera and that only such particulars as the court may allow may be published.

17.2 It is an established principle of our law that justice should not only be done but that the general public should also be able to see that justice is done. For this reason, hearings normally take place in open court and the publication of the evidence given is freely permitted. The reason given for the proposed exception in the case of divorce proceedings is that a divorce is a highly personal matter. The public has an interest in the matter only in so far as the status of the parties is concerned. The intimate relationship of the parties and the causes of their marriage break-down do not, however, concern the public. Such details are published merely to stimulate the public taste for sensation.

17.3 In question 25 of its questionnaire, the Commission asks whether the publicity enjoyed by divorce proceedings ought to be restricted and, if so, to what extent. The response to this question was overwhelmingly in favour of a total ban on the publication of all particulars except the fact that divorce proceedings between the parties concerned have been instituted or that a decree of divorce has been granted or refused.

18. SUMMARY OF THE COMMISSION'S CONCLUSIONS AND RECOMMENDATIONS

18.1 The object of reforming the law of divorce

The Commission is satisfied that marriage break-down cannot be effectively curbed by means of legal rules. The reforms recommended by the Commission are not aimed at curbing the rising divorce rate. They are aimed at laying down realistic rules for the dissolution of marriages, eliminating anomalies in the existing divorce laws and at supplying the deficiencies that exist.

18.2 Grounds of divorce.

The Commission subscribes to the view that the application of the guilt principle as a basis for the purposes of dissolving a marriage is the source of the main problems that are experienced in the law of divorce. In particular, the Commission finds it to be a deficiency in the law of divorce that, apart from the statutory grounds of divorce, a marriage can be dissolved by divorce only on the ground of a matrimonial offence having been committed by one of the spouses against the other. On the one hand, the effect of this is that a marriage cannot be dissolved without the co-operation of the so-called innocent party and that, on the other hand, the grounds of divorce, are artificially created or invented. The Commission finds it more realistic for divorce to be based on the fact that a marriage relationship has broken down irretrievably. Consequently the Commission recommends that, as the corner-stone of the law of divorce, the rule be laid down that a marriage that is no longer viable is capable of dissolution when this is sought by either of the parties to the marriage and that apart from mental illness (in which is included a state of permanent unconsciousness) this should constitute the only ground of divorce - clauses 3, 4 and 5 of the proposed Bill. The Commission finds the mere consent of both spouses to be unacceptable as a ground of divorce in the South African law of divorce.

18.3 Divorce against the wishes of one of the spouses

The Commission feels that neither the parties concerned nor society can benefit by continuing a marriage which exists only in name and which, as a marriage in the true sense of the word, is dead. In the Commission's opinion, a person should not be kept shackled to a marriage as a form of punishment for his own misconduct or because of the other party's religious beliefs. Therefore, the Commission cannot agree with the view that a divorce court should, notwithstanding the irretrievable break-down of a marriage, have a discretion to refuse a decree of divorce on the ground that the granting of such a decree will in those particular circumstances result in exceptional hardship for the defendant.

18.4 Proof of irretrievable marriage break-down

The Commission carefully considered the question whether criteria should be laid down by which a court shall establish whether a marriage has broken down

irretrievably. In particular, the Commission considered whether the fact that the spouses have for a specified period no longer been living together as man and wife is acceptable as such a criterion. The Commission came to the conclusion that each case must be decided on its own merits by taking into account all the relevant facts as a whole. No rules need be prescribed in this regard. The Commission finds it desirable, however, that for the guidance of the courts, legal practitioners and the public in general, the most important factors indicative of the irretrievable break-down of a marriage should be regarded evidence which a court may accept as proof of break-down - clause 4(3) of the Bill.

18.5 Divorce procedure

The Commission considered whether the introduction of irretrievable marriage break-down as a new ground of divorce would necessitate a new divorce procedure. In particular, the Commission considered whether an inquisitorial procedure instead of the existing accusatorial procedure ought to be followed. It also considered whether divorce proceedings should be instituted by means of an application procedure rather than a summons procedure. The Commission feels that the existing procedure should be departed from only in so far as the proposed new ground of divorce does not fit in with it. It would seem to the Commission that only minor procedural changes will be necessary.
In clause 11 of the proposed Bill, provision is made for the prescription of the procedure by rules of court.

18.6 Reconciliation of the parties

In the Commission's opinion, the function of the law with regard to the reconciliation of the spouses does not go beyond the provision of rules that will create sufficient opportunity for them to become reconciled before their marriage is dissolved. Reconciliation cannot be forced upon the spouses. The Commission considers it unnecessary that a welfare investigation into the possibilities of reconciliation should be carried out in each case. The Commission recommends, therefore, a procedure by which the court must judge whether reconciliation is a reasonable possibility and, if so, the court must offer the parties the opportunity of availing themselves of this possibility - clause 4(4) of the Bill.

18.7 Family courts

The Commission seriously considered the scores of proposals that, inter alia, divorce proceedings should be handled by special family courts. From the point of view of costs and manpower the Commission does not consider the setting up of family courts to be a practical proposition. Indeed, the Commission is satisfied that the existing divorce courts can efficiently adjudicate upon divorce proceedings, and it does not feel that there is any need to establish special family courts for this purpose.

18.8 The interests of children

The Commission agrees with the view that the interests of children who are involved in divorce suits should enjoy the highest priority. For this reason the Commission recommends as a fundamental rule that no decree of divorce should be granted until such time as the court is satisfied that the provision that has been made or is intended to be made for the welfare of minor or dependent children is satisfactory or the best that can be made in the circumstances. It should also be competent for the court to cause any investigation which it deems necessary to be instituted in order to establish what would best serve the interests of the children. Further, it should be competent for the court, if it deems this necessary, to order that the children be separately represented at the proceedings. The Commission is not, however, in favour of welfare investigations into the interests of the children being made compulsory. The Commissions' recommendations are embodied in clause 6 of the Bill.

18.9 Forfeiture of patrimonial benefits of a marriage

The Commission considered the arguments in favour of the abolition of the forfeiture of marriage benefits, but it is of the opinion that it would be unfair to a spouse who is really innocent if the party whose misconduct was the main or sole factor that gave rise to the break-down of the marriage were to be allowed to gain any patrimonial benefit from the other party in consequence of his conduct. However, the Commission feels that the blame-worthiness of a party should not be unduly emphasised and taken into consideration as the only factor. Mindful of the fact that both spouses can be to blame for the break-down of their marriage, the Commission recommends that it should be competent for the court to make an order for the forfeiture in full

or in part of the patrimonial benefits of a marriage - clause 7 of the Bill.

18.10 Maintenance

Although the misconduct of a spouse is a factor that ought to be taken into account in deciding the question whether he or she should be compelled to contribute towards the maintenance of the other party upon the dissolution of the marriage, the Commission is of the opinion that blameworthiness of a party in this connection receives undue emphasis in our present law. The Commission recommends that, in cases where the parties have not entered into an agreement in relation to the payment of maintenance by the one to the other, the court, in making a maintenance order, should take into account the duration of the marriage; the property of the respective parties; the age, state of health and earning capacity of the party claiming maintenance; and the standard of living of the parties before divorce, together with the extent to which either of the parties may have been to blame for their marriage breaking down - clause 8 of the Bill.

18.11 Costs

The postulate that a successful party to an action is entitled to an order as to costs in his favour derives from the guilt principle. Since a party's guilt will not play such an important part under the proposed dispensation, it is necessary to adjust the basic rule relating to costs. The Commission feels that the court should have a wider discretion with regard to the award of costs to a party and should, inter alia, take into account the property of the respective parties. It should also be competent for the court to divide the costs between the parties. The Commission's recommendation in this regard is embodied in clause 10 of the proposed Bill.

18.12 Judicial separation

In the Commission's opinion, judicial separation is not compatible with the concept that underlies the dissolution of a marriage on the ground of its having broken down irretrievably. The Commission recommends, therefore, that judicial separation be abolished - clause 14 of the Bill.

18.13 The publicity that divorce proceedings receive

The Commission is satisfied that in the normal course of events the publica-

tion of particulars concerning divorce proceedings does not serve the public interest but is prejudicial to the parties and especially the children involved in a divorce. The Commission recommends that only the fact that a divorce suit between certain persons is pending or that their marriage has been dissolved by divorce may be published for the information of the public. The Commission feels that, if this restriction were to be introduced, there would be no need to conduct divorce proceedings in camera - clause 12 of the Bill.

19. EXPLANATORY NOTES ON THE PROPOSED BILL

19.1 The definition of "divorce proceedings" in clause 1 of the Bill is necessary for the purposes of clauses 2, 12, and 15. The contents of the definition are largely in agreement with the provisions of sections 1(2) and 2 of Act 22 of 1939, which are proposed for repeal in terms of clause 17.

19.2 The definition of "court" includes only those courts that have jurisdiction in divorce proceedings at present.

19.3 Clause 1(2) of the Bill is intended to eliminate confusion as regards the date of issue of the summons and the date of service thereof on the opposing party.

19.4 The Commission finds it desirable that the common law position with regard to a court's jurisdiction in divorce proceedings, as extended by the provisions of Act 22 of 1939, should be set forth clearly. Provision is made for this in clause 2 of the Bill. The Commission heard evidence to the effect that the requirement laid down in section 1 of Act 22 of 1939 that the wife shall also have been resident within the area of jurisdiction of the court concerned for one year immediately preceding the institution of proceedings, is unreasonable in certain cases and ought to be eliminated. It is suggested that, where by virtue of her domicile, the court has no jurisdiction, jurisdiction may be based on the fact that she is resident within the court's area of jurisdiction and was usually resident in the Republic for one year immediately preceding the institution of proceedings, provided she is domiciled in the Republic or was so domiciled before her husband left her or she was a South African citizen or was domiciled in the Republic immediately

before her marriage. In the Commission's opinion the provisions of Act 22 of 1939 that have not been embodied in the Bill need not be re-enacted.

19.5 As has already been pointed out, the provisions of clause 4(3) of the Bill are, strictly speaking, not necessary. However, the Commission feels that, with a view to switching to a new dispensation, it is necessary to give guidance in connection with principal factors that point to the irretrievable break-down of a marriage.

19.6 Provision is made in clause 13 for the re-enactment of the provisions of section 6bis of Act 22 of 1939 which are repealed by clause 17. To date, no proclamation has ever been published in terms of the said Act.

19.7 In the Commission's view the provisions of Act 32 of 1935 that have not been embodied in the Bill need not be re-enacted. In this connection the Commission consulted with the Chief Master of the Supreme Court and the Department of the Interior.

20. CONCLUSION

The Commission wishes to express its thanks to all who contributed to the completion of this project in the form of proposals, comments or oral evidence.

CHAIRMAN

A N N E X U R E A

B I L L

To amend the law relating to divorce and to provide for incidental matters.

To be introduced by the Minister of Justice

BE IT ENACTED by the State President, the Senate and the House of Assembly of the Republic of South Africa, as follows:-

Definitions.

1. (1) In this Act, unless the context otherwise indicates -

"court" means the provincial or local division of the Supreme Court of South Africa or a Bantu Divorce Court instituted by section 10 of the Bantu Administration Act, 1927, Amendment Act, 1929 (Act 9 of 1929), which has jurisdiction in the proceedings concerned; and

"divorce proceedings" means an action by which a decree of divorce or other relief in connection therewith is sought and also any application for an interdict pending the institution of such action or an application for the payment of maintenance pendente lite or for a contribution towards the costs of such action or an application for interim custody of or access to a minor child of the marriage or an application to institute such action or any such proceedings in forma pauperis or an application for substituted service of process or for the edictal citation of a party.

(2) For purposes of this Act proceedings are deemed to be instituted on the date on which the summons is issued or the notice of motion is filed, as the case may be.

Jurisdiction.

2. (1) A court has jurisdiction in divorce proceedings if -

(a) the parties are domiciled in the area of jurisdiction of the court on the date on which the proceedings are instituted; or

(b) the wife is the plaintiff or applicant and she is ordinarily resident in the area of jurisdiction of that court on the date on which the proceedings are instituted and has been ordinarily resident in the Republic for a period of one year immediately prior to the said date, and -

(i) is domiciled in the Republic; or

(ii) was domiciled in the Republic immediately before cohabitation between her and her husband had come to an end; or

(iii) was a South African citizen or was domiciled in the Republic immediately prior to her marriage.

(2) A court which has jurisdiction in terms of paragraph (b) of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in such proceedings.

(3) A court which has jurisdiction in terms of this section in a case where the parties are not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled

in the area of jurisdiction of the court concerned on the date on which the proceedings are instituted.

(4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other act or the common law.

Grounds of divorce.

3. Subject to the provisions of section 15, a decree of divorce shall after the commencement of this Act be granted on no other ground than -

(a) the irretrievable break-down of a marriage referred to in section 4; or

(b) the mental illness or unconsciousness of a spouse referred to in section 5.

Divorce on the ground of irretrievable break-down of a marriage.

4. (1) A decree of divorce shall be granted on the ground of the irretrievable break-down of a marriage if the court is satisfied that the marriage relationship between the parties has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

(2) In the application of subsection (1) the court may, in so far as it may appear to be necessary, inquire into the circumstances of the alleged disintegration of the marriage relationship and the attitude manifested by the parties towards each other and towards their marriage relationship.

(3) Subject to the provisions of subsections (1) and (2), and without excluding any facts or circum= stances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence that -

(a) the parties have for a continuous period of at

least one year immediately prior to the date of the institution of the proceedings not lived together as husband and wife in the same household; or

(b) the defendant has committed adultery and that the plaintiff finds it irreconcilable with the continuation of the marriage relationship; or

(c) the defendant has in terms of a sentence of a court been declared a habitual criminal and is undergoing imprisonment as a result of such sentence,

as proof of the irretrievable break-down of a marriage.

(4) If in the opinion of the court a reasonable possibility exists that the parties may become reconciled through marriage guidance, treatment or further reflection, the court may postpone the proceedings from time to time to enable the parties or any one of them to utilise the opportunity for reconciliation.

(5) When undefended divorce proceedings are postponed in terms of subsection (4) the court may direct that the proceedings may on the date of the resumption thereof be tried de novo by any other judge of the division concerned.

Divorce on the ground of the mental illness or unconsciousness of a person.

5. (1) A court may grant a decree of divorce on the ground of the mental illness of the defendant if -

(a) the court is satisfied that the defendant in terms of the Mental Health Act, 1973, -

(i) has been admitted as a patient in an institution in terms of a reception order; or

(ii) is being detained as a President's patient

of such representation.

(4) The court may make any order it finds appropriate with regard to the furnishing of security by the plaintiff in respect of any patrimonial benefits to which the defendant may be entitled by reason of the divorce.

(5) For purposes of this section the expressions "institution", "mental illness", "patient" and "President's patient" shall bear the meaning assigned to them in the Mental Health Act, 1973 (Act 18 of 1973).

Safeguarding of interests of dependent and minor children.

6. (1) A decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can in the circumstances be effected.

(2) For purposes of subsection (1) the court may cause any investigation it finds necessary to be carried out and order any person to appear before the court and order the parties or any one of them to pay the costs of such appearance.

(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of or access to a minor child of the marriage, make any order which the court finds appropriate, and in particular the court may, if in the opinion of the court it would be in the interest of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to a marriage)

or sole custody of the minor, and the court may order that on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

(4) For purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and order the parties or any one of them to pay the costs of such representation.

Maintenance of parties and division of assets.

7. (1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order in regard to the division of the assets of the parties or the payment of maintenance by one party to the other.

(2) In the absence of an agreement in regard to maintenance the court, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, their standard of living prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, and any other factor which in the opinion of the court should be taken into account, may make an order which the court finds just in respect of the payment of maintenance by one party to the other.

Rescission, suspension or variation of orders.

8. (1) A maintenance order or an order in regard to the custody or guardianship of or access to a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order for access to a child,

be suspended by a court if the court finds that there is sufficient reason to do so.

(2) A court, other than the court which made an original order referred to in subsection (1), has jurisdiction to rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

(3) The provisions of subsections (1) and (2) shall apply mutatis mutandis to any order referred to in subsection (1) which was given by a court in divorce proceedings before the commencement of this Act.

Forfeiture of patrimonial benefits of a marriage.

9. (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage shall be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the cir= cumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that failing such order for forfeiture the one party will be unduly benefited as against the other.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant no order for the forfeiture of any patrimonial

benefits of the marriage shall be made against the defendant.

Costs.

10. In divorce proceedings the successful party shall not necessarily be entitled to an order for costs in his favour but the court may, having regard to the means of the parties and their conduct in so far as it may be relevant, make an order which the court finds just, and the court may order that the costs of the proceedings be apportioned between the parties.

Procedure.

11. The procedure applicable to divorce proceedings shall be the procedure prescribed from time to time by rules of court.

Limitation of the publication of particulars in divorce proceedings.

12. (1) Except for making known or publishing the names of the parties to divorce proceedings, the fact that such proceedings between the said parties are pending in a court of law or that a decree of divorce has or has not been granted in respect of the said parties, no person shall make known in public or publish for the information of the general public or any section of the public any particulars of divorce proceedings or any information which comes to light in the course of such proceedings, and in particular, it shall not be made known who is the plaintiff and who the defendant in such proceedings.

(2) The provisions of subsection (1) shall not apply to the publication of particulars -

(a) for purposes of the administration of justice; or

(b) in a bona fide law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or

(c) for the advancement of or use in a particular profession or science.

(3) The provisions of subsections (1) and (2) are mutatis mutandis applicable to proceedings with regard to the enforcement or variation of any order made in terms of this Act.

(4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or imprisonment not exceeding one year, or to both such fine and such imprisonment.

Recognition of certain foreign divorce orders.

13. (1) The validity of a decree of divorce granted in a country or territory in which the husband is not domiciled at the time of the granting of the decree shall be recognised by a court in the Republic if that country or territory is designated by the State President by proclamation in the Gazette for the purposes of the recognition of such decrees.

(2) The State President may designate a country or territory for the purposes of subsection (1) if he is satisfied that the law of that country or territory makes provision for the exercise of jurisdiction which substantially corresponds with the jurisdiction referred to in section 2(1)(b)(ii) and (iii).

(3) No proclamation shall be made in terms of this section unless the State President is satisfied that the law of the country or territory concerned makes sufficient provision

for the recognition by the courts of that country or territory of a decree of divorce granted in the Republic in terms of section 2(1)(b)(ii) or (iii).

(4) A proclamation made in terms of this section may be withdrawn at any time.

Abolition of orders for restitution of conjugal rights and judicial separation.

14. Subject to the provisions of section 15, no order for the restitution of conjugal rights or for judicial separation shall be granted after the commencement of this Act.

Application.

15. This Act shall not apply to divorce proceedings for the restitution of conjugal rights or for judical separation instituted before the commencement of this Act.

Amendment of section 5 of Act 37 of 1953.

16. Section 5 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), is hereby amended -

(a) by the deletion of paragraph (a) of subsection (1);

(b) by the substitution for subsection (3) of the following subsection:

"(3) Subject to any order of court -

(a) a parent to whom the sole guardianship or custody of a minor has been granted under subsection (1) or under the Divorce Act, 1978, or a father or a mother upon whom a children's court has under section 60(1) of the Children's Act, 1960 (Act 33 of 1960), conferred the exclusive right to exercise any parental powers in regard to a minor, may by testamentary disposition appoint any person to be the sole guardian or to be vested with the sole custody of the minor, as the case may be; and

(b) the father of a minor to whom the sole guardianship of the minor has not been granted under subsection (1) or under the Divorce Act, 1978, or upon whom a children's court has not conferred the exclusive right to exercise any parental powers in regard to the minor, shall not be entitled by testamentary disposition to appoint any person as the guardian of the minor in any other manner than to act jointly with the mother."; and

(c) by the substitution for subsection (6) of the following subsection:

"(6) If an order under section 60 of the Children's Act, 1960, is rescinded, or if an order under subsection (1) of this section or under the Divorce Act, 1978, granting the sole guardianship or custody of a minor to a parent, lapses or is rescinded or is varied in such a manner that the parent is no longer the sole guardian or vested with the sole custody of the minor, any disposition under subsection 3(a) shall lapse.".

Amendment of section 72 of Act 66 of 1965.

17. Section 72 of the Estates Act, 1965, (Act 66 of 1965), is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), and section 4 of the Matrimonial Affairs Ordinance, 1955 (Ordinance 25 of 1955), of the territory, or any order of court made under any such provision or under any provision of the Divorce Act, 1978, on the written appli= cation of any person -

(a) who has been nominated by will or written instrument -

(i) by the father of a legitimate minor, who has not been deprived, as a result of an order under subsection (1) of the said section 5 or subsection (1) of the said section 4 or under the Divorce Act, 1978, of the guardianship of such minor, or under section 60 of the Children's Act, 1960 (Act 33 of 1960), or section 58 of the Children's Ordi= nance, 1961 (Ordinance 31 of 1961), of the territory, of his parental powers over him; or

(ii) by the mother of an illegitimate minor or of a legitimate minor whose father is dead, who has not been so deprived of the guardianship of such minor or of her parental powers over him; or

(iii) by the parent to whom the sole guardian= ship of a minor has been granted under subsection (1) of the said section 5 or under subsection (1) of the said section 4 or under the Divorce Act, 1978, or on whom the exclusive right to exercise parental powers in regard to a minor has been conferred under the said section 60 or the said section 58,

to administer the property of such minor and to take care of his person as tutor, or to take care of or administer his property as curator; or

(b) who has been nominated by will or written instrument by any parent of a minor to administer as curator any property which the minor has inherited from such parent; or

(c) who has been nominated by will or written instrument by any deceased person who has given or bequeathed any property to any other person, to administer that property as curator; or

(d) who has been appointed by the Court or a judge to administer the property of any minor or other person as tutor or curator and to take care of his person or, as the case may be, to perform any act in respect of such property or to take care thereof or to administer it; and

(e) who is not incapacitated from being the tutor or curator of the minor or other person concerned or of his property, as the case may be, and has complied with the provisions of this Act,

grant letters of tutorship or curatorship, as the case may be, to such person.".

Repeal.

18. The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

Short title and commence= ment.

19. This Act shall be called the Divorce Act, 1978, and shall come into operation on a date to be fixed by the State President by proclamation in the Gazette.

SCHEDULE

No. and year of law	Title	Extent of repeal
Act 32 of 1935	Divorce Laws Amendment Act, 1935	The whole
Act 22 of 1939	Matrimonial Causes Jurisdiction Act, 1939	The whole
Act 17 of 1943	Matrimonial Causes Jurisdiction Amendment Act, 1943	The whole
Act 35 of 1945	Matrimonial Causes Jurisdiction Act, 1945	The whole
Act 37 of 1953	Matrimonial Affairs Act, 1953	Sections 6, 7, 8, 9 and 10
Act 70 of 1968	General Law Amendment Act, 1968	Sections 21, 22 and 23

ANNEXURE B

QUESTIONNAIRE

1. What, in your opinion, should be the objects of a sound divorce law?

2. Are you in agreement with the premise that a marriage should still be seen as a life-long union which ought only to be dissolved where sound reasons exist?

3. What contribution can the law in your opinion make to buttress the stability of marriage?

4. What, in your opinion, are the defects or shortcomings of our divorce law?

5. Are you of the opinion that divorce is too easily obtained in our law? If so, what restrictions do you suggest?

6. Are there in your opinion circumstances where our law makes it too difficult to obtain a divorce? If so, what solutions do you suggest?

7. Are you of the opinion that a prohibition upon divorce within a certain period (say 2 years) after the date of the marriage should be introduced into our law?

8. What provision should in your opinion be made in our law for reconciliation of the parties before the granting of a divorce?

9. Are you of the opinion that a period should elapse between the date of the issue of summons and any provisional or final decree of divorce in order to give the parties an opportunity for reconciliation?

10. Are you of the opinion that positive proof of attempted reconciliation should be required before a decree of divorce is granted?

11. What, in your opinion, should be the grounds of divorce in our law?

12. Are you of the opinion that fault (as applied in divorce on the ground of adultery or malicious desertion) should be retained as the basis for the dissolution of a marriage?

13. What are your views with regard to irretrievable break-down of a marriage as a ground for divorce?

14. If you are in favour of irretrievable break-down of marriage being made a ground of divorce in our law, are you of the opinion that it should become the sole ground of divorce or should it merely be added to the existing grounds of divorce?

15. Could irretrievable break-down of marriage in your opinion operate as a ground of divorce within the existing framework of our divorce procedure? How, for instance would break-down be proved and what criteria should the court apply to determine whether the break-down is in fact irretrievable?

16. Are you of the opinion that proof of a period of separation between the parties, with or without additional requirements, should be conclusive proof of irretrievable break-down of a marriage? If so, what period do you suggest and what additional requirements, if any?

17. Should the cause of the break-down of a marriage play any part in the dissolution of the marriage? If so, what part?

18. Are you in favour of the dissolution of a marriage against the will of any of the parties if the marriage is proved to have broken down irretrievably?

19. If the conduct of one of the parties is proved to be the cause of the break-down of the marriage, are you of the opinion that the court should have a discretion to refuse the dissolution of the marriage if the other party opposes the divorce proceedings?

20. Are you of the opinion that divorce by consent of the parties could in particular circumstances be justified? If so, what circumstances?

21. What measures should in your opinion be taken to protect the interests of minor children upon divorce of their parents?

22. What measures should in your opinion be taken to protect the interests (financial as well as other interests) of the parties upon their divorce?

23. Is our divorce procedure in your opinion satisfactory. If not, what improvements do you suggest?

24. What are your views with regard to special family courts for adjudicating upon divorce matters? How should such courts be composed and how should they function?

25. Are you of the opinion that the publicity that divorce matters enjoy should be restricted? If so, to what extent?

26. Have you any suggestions with regard to disposal of the matrimonial property upon divorce?

27. Should judicial separation be retained in our law?

ANNEXURE C

NAMES OF PERSONS AND BODIES THAT COMPLETED THE QUESTIONNAIRE OR PUT PROPOSALS TO THE COMMISSION

1. EDUCATIONAL INSTITUTIONS

The University of Durban-Westville

The University of Fort Hare

Die Potchefstroomse Universiteit vir Christelike Hoër Onderwys

The University of Cape Town

The University of the Orange Free State

The University of Port Elizabeth

The University of Pretoria

The University of South Africa

The University of the Witwatersrand

The Training Division of the Department of Justice

2. THE BENCH

THE APPELLATE DIVISION OF THE SUPREME COURT OF SOUTH AFRICA

The Honourable G.N. Holmes

The Honourable W.G. Trollip

The Honourable S. Hofmeyr

THE NATAL PROVINCIAL DIVISION OF THE SUPREME COURT OF SOUTH AFRICA

The Honourable S. Miller

The Honourable A.J. Milne

The Honourable J.J. Kriek

The Honourable J.A. Howard

The Honourable M.E. Kumleben

The Honourable J.M. Didcott

THE EASTERN CAPE PROVINCIAL DIVISION OF THE SUPREME COURT OF SOUTH AFRICA

The Honourable A. G. Jennett, Judge President

The Honourable D.D.V. Kannemeyer

THE NORTHERN CAPE PROVINCIAL DIVISION OF THE SUPREME COURT OF SOUTH AFRICA

The Honourable H.R. Jacobs, Judge President

The Honourable Miss L. van den Heever

THE SOUTH-WEST AFRICA DIVISION OF THE SUPREME COURT OF SOUTH AFRICA

The Honourable J.J. Strydom

3. COUNCILS AND SOCIETIES

The Natal Law Society

The Law Society of the Orange Free State

The Law Society of the Transvaal

The Law Society of the Cape of Good Hope

National Council for Marriage Guidance and Family Life (S.A.)

The Human Sciences Research Council

The South African Indian Council

The South African National Council for Child and Family Care

4. CHURCH BODIES

The Church of the Province of South Africa

The Baptist Church of South Africa

The Apostolic Faith Mission of South Africa

The Methodist Church of South Africa

Nederduits Gereformeerde Kerk van Transvaal

Nederduitsch Hervormde Kerk van Afrika

The Presbyterian Church of South Africa

5. WOMEN'S ORGANISATIONS

Aksie 75 Action

Federal Council of Women

National Council of Women of South Africa

South African Federation of Business and Professional Women

South African Association of University Women

Women's Agricultural Union of the Cape Province

Women in Action

6. GOVERNMENT DEPARTMENTS

Administration of Coloured Affairs

Department of Plural Relations and Development

Department of the Interior

Department of Health.

ANNEXURE D

PERSONS WHO GAVE ORAL EVIDENCE BEFORE THE COMMISSION

1. ON BEHALF OF THE FAMILY LIFE COMMISSION :

   Mr G.J. van Zyl (Chairman)

   Professor J.D.G. van der Merwe

2. ON BEHALF OF AKSIE 75 ACTION :

   Advocate A.S. van der Spuy

   Mrs A. van der Spuy

   Mrs D. Friedman

3. ON BEHALF OF THE WOMEN'S LEGAL STATUS COMMITTEE :

   Mrs C. Duval

   Mrs B. Kabak

   Mrs R. Johnston

4. ON BEHALF OF THE LAW SOCIETY OF THE TRANSVAAL :

   Mr T.T. Baskin

   Mr A. de Kock

5. ON BEHALF OF THE NATIONAL COUNCIL FOR MARRIAGE GUIDANCE AND FAMILY LIFE:

   Mrs S. Bavery

6. ON BEHALF OF THE SOUTH AFRICAN NATIONAL COUNCIL FOR CHILD AND FAMILY CARE :

   Miss S.E. van Niekerk

   Mrs F. Rautenbach

7. ON BEHALF OF THE DEPARTMENT OF HEALTH :

   Dr J.A. Plomp

   Dr H.P. van der Merwe